Hepting et al v. AT&T Corp. et al Doc. 304

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. AT&T CORP., AT&T INC. and DOES 1-20, inclusive, Defendants.	Case No. C-06-0672-VRW **UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION TO FILE SUPPLEMENTARY MATERIAL** Judge: The Hon. Vaughn R. Walker

INTRODUCTION

Plaintiffs seek to submit as supplementary material a June 30, 2006 article in USA Today that they claim contains "important information" relating to the United States' Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary

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Judgment. Plaintiffs claim that the information in this article rebuts the United States' assertions made at the June 23, 2006 oral argument. Plaintiffs are mistaken and their motion should be denied.

ARGUMENT

A newspaper article is, of course, perhaps the purest form of hearsay and certainly cannot be admitted for the truth of any matter asserted, even on summary judgment. Beyond this, assuming the article was accepted for the mere fact of what it states, and not its truth content, the article does not undermine what the United States has said – indeed it confirms our position in material respects.

First, as with prior media reports, this report is quite far from any kind of official or formal acknowledgment of any information by the President or responsible agency. It is replete with references to "anonymous" sources. This does not serve to declassify anything, even if it purportedly comes from a member of the legislative branch who reportedly was provided with certain information. Courts have consistently refused to deem "official" a disclosure made by someone other than the agency that maintains the particular information. *See, e.g., Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) ("we do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought"); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[B]are discussions by this court and the Congress of [the National Security Agency's] methods generally cannot be equated with disclosure by the agency itself of its methods of information gathering"); *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 659 F. Supp. 674, 684 (E.D.N.Y. 1987) ("[O]nly authorized and official disclosures can result in declassification. Thus, even if plaintiffs were able to obtain evidence that an unauthorized 'leak' had in fact occurred, these statements could not, as a matter of law, result in declassification of the existence of a Navy proposal to deploy nuclear weapons at the homeport."), *aff'd*, 891 F.2d 414, 421 (2d Cir. 1989).

Indeed, in *Halkin v. Helms* (*"Halkin I"*), 598 F.2d 1,4 (D.C. Cir. 1978), the court did not pause over the fact that certain information about activities undertaken by the National Security

Agency to intercept international telegrams had been publicly acknowledged during the course of congressional hearings in upholding the Government's state secrets privilege assertions in that case. *See id.* at 4, 10. Rather, it expressly *reversed* a district court finding that, because congressional committees had revealed information about an NSA program, further disclosure "would pose no threat to NSA's mission." *See id.* at 10.[1]

Thus, with due respect to the legislative branch, even if individual members discussed classified information with USA Today (which of course cannot be deemed proven on the basis of this article), that would in no way constitute any confirmation, acknowledgment, or permissible disclosure of classified information, which remains under the *exclusive* control of the President and his designees, such as the Director of National Intelligence. *See Department of the Navy v. Egan,* 484 U.S. 518, 527 (1988).

Moreover, this particular newspaper story, far from lending clarity to anything, merely adds to the muddled and confused information about the matter in the media. Among other things, the article concedes that only "limited responses" were provided based on national security concerns. *See* Article, Exhibit 1 to DiMuzio Declaration at 1. It reports on admitted errors in USA Today's prior story on the matter. *See id.* at 1-2. And it contains more unconfirmed speculation about what particular telecommunications carriers did or did not do. *See id.* Thus, precisely as the Government has argued here, this type of incomplete, inaccurate speculation from anonymous sources cannot plausibly constitute an indication of actual fact on the matter, let alone actual confirmation of anything. Moreover, to require that the true facts protected by the Government's state secrets assertion be disclosed by the Executive branch, based on anonymous media speculation, would obviously eviscerate the state secrets privilege, by placing it at the whim of individuals, even legislators, who anonymously leak or even attempt to discuss classified matters in some "limited" fashion. It would also result in inherently unreliable information in newspapers forcing the disclosure of actual, confirmed fact, and provide terrorist adversaries with certainty as to the Government's actions in the face of the uncertainty reflected in media reports.

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[1] *See also* Halkin v. Helms ("*Halkin II"*), 690 F.2d 977, 994 (D.C. Cir. 1982); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 76-77 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir. 2005) ("That privileged information has already been released to the press or provided in briefings to Congress does not alter the Court's conclusion" that the government sufficiently invoked the state secrets privilege). Similarly, in other cases involving the protection of classified information, courts have consistently held that because some information about classified activities has made its way into the public domain does not mean that information about those activities must be declassified. *See, e.g.,Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990); *Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993); *Edmonds v. FBI*, 272 F. Supp. 2d 35, 49 (D.D.C. 2003); *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1242-43 (4th Cir. 1985); *Afshar v. Department of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983); *El-Masri v. Tenet*, No. 1:05cv1417, 2006 WL 1391390, *5 (E.D.Va. 2006 May 12, 2006).

CONCLUSION

If the court wishes to read this newspaper article, it obviously can do so, though it should not consider it as evidence for its truth content. And it does not, as a matter of fact or law, trump the Executive's assertion of the state secrets privilege. Plaintiffs' motion to supplement the record should be denied.

Respectfully submitted,

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DATED: July 11, 2006

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION TO FILE SUPPLEMENTARY MATERIAL, Case No. C 06-0672-VRW**, will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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